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April 23, 2015

Jeff S. Jordan
Supervisory Attorney
Complaints Examination & Legal Administration
Federal Election Commission
999 E Street, NW
Washington, DC 20463
VIA FACSIMILE: (202) 219-3923

Re: MUR 6920- American Conservative Union Response to Complaint

Dear Mr. Jordan:

We are writing this letter on behalf of our client, American Conservative Union ("ACU"), in response to the Complaint filed by the Citizens for Responsibility and Ethics in Washington ("CREW") alleging that ACU violated the Federal Election Campaign Act of 1971, as amended ("FECA" or "Act"), and Federal Election Commission ("Commission") regulations by knowingly making a contribution in the name of another. The Complainant is a self-styled "good government" group that routinely files baseless, speculative complaints, and this is no exception. We respectfully request that the Commission dismiss the Complaint in this matter as it is not worthy of the Commission's limited time and resources.

I. Background

ACU is a tax-exempt social welfare organization organized under section 501(c)(4) of the Internal Revenue Code. ACU is the oldest and largest conservative grassroots organization in the United States. ACU promotes conservative positions on issues to Members of Congress, the Executive Branch, State legislators, and the public. In addition, ACU has a long history of engaging in political activity consistent with IRS regulations.

During the 2012 election cycle, ACU made a contribution to Now or Never PAC, an Independent Expenditure-Only Committee registered with the Commission. The Complaint alleges that the funds for this contribution were not from ACU, and as a result, ACU knowingly made a contribution in the name of another. The Complaint's basis for this assertion is ACU's

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Amended 2012 Form 990 which disclosed a contribution of \$1.71 million to Now or Never PAC, and included language added by ACU's auditors which stated that "the \$1.71 million was a political contribution received by the Organization and promptly and directly delivered to a separate political organization." The auditors did not consult with contemporaneous ACU staff regarding the nature of this transaction, and instead relied upon the face of ACU's financials to support their notation on the amended IRS filing.

The facts are that the ACU received donations totaling \$10,277,123 in 2012, including an amount similar to \$1.7 million, and those \$10,277,123.00 of donations were deposited into ACU's general treasury account. ACU engaged in a wide range of public education and political activities in 2012, including making electioneering communications. Those political activities included a contribution of \$1.7 million to Now or Never PAC on October 31, 2012. At the time of both the contribution to ACU, and ACU's other election-related 2012 activity, ACU staff consulted with experienced legal counsel to confirm that such transactions were permissible under the Act. 1

II. Legal Analysis

Section 501(c)(4) nonprofit organizations are permitted to engage in partisan political activity so long as such activity does not becomes the organization's primary purpose.² In addition, IRS regulations permit 501(c)(4) organizations to accept political contributions that are "promptly and directly" transferred to a separate segregated fund.³ Thus, ACU was permitted to accept funds from a person and subsequently contribute those funds or a mixture of funds, to a separate segregated fund or political committee. Likewise, it was permissible for Now or Never PAC to accept the contribution and disclose that it was received from ACU. The question here, however, is whether Now or Never PAC was also required to investigate, determine, and then disclose the name of the person or corporation who made the donation or donations to ACU whose funds were then donated to Now or Never PAC.

A. Section 441f is an Anti-Circumvention Rule that is Inapplicable to Super PACS

The Act provides that "no person shall make a contribution in the name of another person or knowingly permit his name to be used to effect such a contribution, and no person shall knowingly accept a contribution made by one person in the name of another person." This statute was designed to prevent the circumvention of contribution limits, and is clearly applicable to and has been enforced regarding contributions to candidates, separate segregated funds, and

ACU staff consulted with an election law attorney at Wiley Rein LLP, a well-known and highly regarded firm that includes a former PEC Commissioner and represents many prominent organizations.

² Rev. Rul. 81-95, 1981-1 C.B. 332.

³ 26 C.F.R. § 1.527-6(e).

⁴ 2 U.S.C, § 441f (current version at 52 U.S.C.S. § 30122).

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traditional PACs. The legislative history of the Act demonstrates that the purpose of 441f was to prevent individuals from using conduits or straw donor schemes to evade the contribution limits. For example, one of the primary sponsors of the bill that ultimately became Section 441f confirmed that he was aware of schemes to evade the contributions limits, including schemes involving "donations through brothers, sisters, cousins, aunts and infant children" and schemes in which "an employee gets a cash bonus with the understanding that a portion will go to a favored candidate." After hearing more evidence of different schemes, Senator Mathias applauded the bill for "making some limitation on contributions so that rich men can no longer buy elections, either by contributing to their own campaigns or by having families and friends contribute inordinate amounts to various hidden committees." Congress recognized that there would be schemes to evade the contribution limits that applied to candidates and political committees, and enacted Section 441f to address that concern.

Importantly here, no contribution limits apply to Independent Expenditure-Only Committees ("Super PACs"). Section 441f is an anti-proliferation rule enacted to prevent circumvention of the contribution limits. Yet, circumvention is not a concern for contributions to Super PACs since they may accept unlimited contributions as there is no risk of corruption. The Supreme Court has long recognized a sharp distinction between contributions to candidates and independent expenditures. Contributions can be restricted to a candidate, the Supreme Court has held, because of the risk that they will lead to quid pro quo corruption, and Section 441f bolsters this restriction. Independent expenditures, however, present no corresponding risk of corruption. The Supreme Court eliminated any doubt about this in Citizens United: "independent expenditures...do not give rise to corruption or the appearance of corruption." With independent expenditures, "[t]he candidate-funding circuit is broken," thereby "negat[ing] the possibility that [the] expenditures will result in the sort of quid pro quo corruption with which our case law is concerned." Section 441f was enacted to address the same concern: that is, the risk of quid pro quo corruption that contributions to candidates pose. Super PACs pose no such risk.

⁵ Federal Election Campaign Act of 1971: Hearings on S.1, S. 382, and S. 956, Before the Subcommittee on Communications of the Senate Committee on Commerce, 92nd Cong., 1st Sess. 233-34 (1971).

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¹ Buckley v. Valeo, 424 U.S. 1, 26-27 (1976) (per curiam).

⁸ Id. at 45.

⁹ Citizens United v. FEC, 558 U.S. 310, 357 (2010).

¹⁰ Az Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2826-27.

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B. The Commission Has Not Applied Section 441f to Super PACs

It is no coincidence that the Commission has not applied Section 441f to Super PAC's because it is constitutionally suspect in light of recent court decisions. There is simply no cognizable anti-corruption interest in enforcing this provision to Super PAC contributions. The only interest the Supreme Court has recognized to justify contribution limits is quid pro quo corruption, and that interest is lost when applied to Super PACs.

In this matter, ACU raised over \$10.2 million in 2012, including the aforementioned contribution to ACU in an amount similar to \$1.7 million. The entire \$10.2 million was deposited into ACU's general treasury account, which was used to pay for a number of political activities during the 2012 election, including the contribution of \$1.7 million to Now or Never PAC. ACU relied in good faith on the advice of experienced legal counsel who confirmed the legality of the transaction at the time it occurred.

III. Conclusion

All funds used to make the contribution to Now or Never PAC came from ACU's general treasury account, the same account that was used to pay for a variety of activities during 2012. Moreover, the contribution was publicly disclosed by Now or Never PAC. The application of Section 441f to contributions made to Super PACs is far from settled, and the Commission should not use an enforcement action to resolve this question. Thus, we respectfully request that the Commission dismiss the Complaint.

Thank you for your consideration of this matter, and please do not hesitate to contact me directly at (202) 572-8663 with any questions.

Respectfully submitted,

Charles R. Spies
Elizabeth Beacham White

Counsel to American Conservative Union

¹¹ For example, LLCs are permitted to make unlimited contributions to Super PACs; however, it has never been interpreted that such contributions violate Section 441f if the Super PAC does not report the names of the individual members of the LLC. See "How the Pounder of the Pugees Became a Big-Time Donor Without Anyone Knowing," slate.com at

http://www.slate.com/articles/news_and_politics/politics/2015/03/pras_michel_funded_super_pac_black_men_vote_limited_liability_companies.html.